



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a
General Order and Procedures to Implement the Digital
Infrastructure and Video Competition Act of 2006.

Rulemaking 06-10-005
(Filed October 25, 2006)

**REPLY COMMENTS OF THE GREENLINING INSTITUTE ON THE OPINION RESOLVING
ISSUES IN PHASE II**

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September 18, 2007

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I. INTRODUCTION

The Greenlining Institute (“Greenlining”) respectfully submits the following reply comments to the California Public Utilities Commission (“Commission” or “CPUC”) in response to the Opinion Resolving Issues in Phase II (“Proposed Decision”) of this proceeding for the implementation of the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA” or “the Act”).

**II. THE BENCHMARKS AND STANDARDS FOR COMPLIANCE WITH DIVCA’S
BUILD-OUT AND NON-DISCRIMINATION PROVISIONS ARE REASONABLE
AND EFFICIENT**

**A. Application of Large Carrier Benchmarks to Small Carriers Furthers DIVCA’s
Intent Without Imposing an Undue Burden on the Carriers.**

California Public Utilities Code § 5890(e) describes the build-out benchmarks with which franchise holders with more than one million telephone customers must comply. Franchise holders with fewer than one million telephone customers are subject to Cal. Pub. Util. Code § 5890(c), which merely states that service must be built out “within a reasonable time, as determined by the commission.” The Commission, in the Proposed Decision, has determined that the standard for a reasonable time for a small franchise holder’s build-out shall be

determined by the same benchmarks as are applied in § 5890(e) to large carriers.¹ As Greenlining stated in its Opening Comments on the Proposed Decision, this decision strikes the proper balance between providing California consumers with increased access to technology, as DIVCA intends to do, and protecting smaller franchise holders from undue compliance burdens.² As Greenlining also noted in its Opening Comments, § 5890(c) allows small carriers to petition for exemption from the benchmarks if compliance would be substantially more costly than the average cost of providing video service in the telephone service area in question. GO 169 also allows small carriers to satisfy company-specific build-out plans approved by the Commission.³ This allows a small carrier to petition for more time to comply with the Commission's build-out standards. These provisions together provide ample opportunity for small franchise holders to fulfill their commitments under DIVCA (in exchange for which they may take advantage of a more streamlined state franchising system) but do so in a manner that does not jeopardize the health of their businesses.

In addition to general build-out requirements, DIVCA also requires that expansion be undertaken in a manner that does not discriminate against low-income consumers. All state franchise holders are subject to Cal. Pub. Util. Code § 5890(a), which generally prohibits franchise holders from discriminating against consumers in low-income communities. Additionally, franchise holders serving more than one million telephone customers are held to specific low-income access benchmarks under § 5890(b). These standards ensure that build-out takes place in a non-discriminatory manner. The Proposed Decision extends the non-

¹ Proposed Decision, p. 14.

² Greenlining Opening Comments, p. 2.

³ General Order 169, § VI(B)(1)(3), p. 11.

discrimination benchmarks from § 5890(b) to small franchise holders.⁴ This provides the Commission a measurable standard for determining whether small franchise holders are in compliance with their obligations under § 5890(a). As Greenlining noted in its Opening Comments, this standard is an important step toward DIVCA's goal of closing the digital divide.

(1) The Commission Needs a Standard by Which It Can Determine Whether a Small Carrier's Build-Out Is Reasonable

The Small LECs contend that the specific non-discrimination benchmarks contained in § 5890(b) were specifically negotiated with the larger service providers during DIVCA's drafting process, and were never intended to apply to smaller carriers. They argue that the Commission has ample resources for enforcing small franchise holder compliance with § 5890(a) without extending benchmarks that were intended to apply only to larger carriers.⁵ While it may be true that these specific standards were negotiated to apply to the larger franchise holders, this is not a persuasive reason for not applying them to smaller franchise holders as well. The Commission needs a way to determine whether small franchise holders are in compliance with § 5890(a)'s general non-discrimination provision. Without any guiding standards, the Commission's process of reviewing compliance with § 5890(a) runs the risk of being inconsistent and unduly time-consuming. With guiding standards, the Commission can easily determine whether a franchise holder is in compliance. The Commission only needs to conduct an in-depth review of a franchise holder's build-out into low-income communities for those holders who have not reached the benchmarks. This streamlines the Commission's enforcement responsibilities while ensuring that consumers in all franchise holders' service territories will have comparable access to video service.

⁴ Proposed Decision, p. 14-15.

⁵ Opening Comments of the Small LECs on the Proposed Decision, p. 2-4.

The Proposed Decision acknowledges the concern raised DRA that small franchise holders will be unable to comply with the non-discrimination benchmarks because of the income demographics in their particular service territories. It provides an alternate mechanism for franchise holders serving relatively few low-income households to remain in compliance with DIVCA's non-discrimination provisions.⁶ Even so, the Small LECs contend that even this relaxed benchmark will be too difficult to meet for franchise holders serving rural areas where low-income households are scattered across their service territory.⁷

Greenlining strongly recommends that the Commission maintain the Proposed Decision's application of § 5890(b)'s non-discrimination benchmarks to smaller franchise holders. As stated above, the Commission will benefit from the use of benchmarks to assess small franchise holder compliance with § 5890(a). Should a small franchise holder find itself in the situation posed by the Small LECs, the Commission can allow the holder to demonstrate by petition that, while it might not be meeting the Commission's benchmarks, it is still building out in low-income communities in a reasonable manner given its service territory and resource constraints. While the Proposed Decision clarifies that there is no extension available for compliance with the general non-discrimination provision contained in § 5890(a), there is no indication either in GO 169 or in the Proposed Decision that small carriers who demonstrate a legitimate need are not permitted to take extra time, commensurate with their demonstrated need, to come into compliance with the benchmarks set forth by the Commission. This system will ensure that franchise holders who *are* able to make aggressive progress toward DIVCA's non-discrimination goals do so, yet will accommodate the needs of franchise holders who are less capable of such aggressive progress. While the point raised by the Small LECs is valid, the possibility that this

⁶ Proposed Decision, p. 15-16.

⁷ Opening Comments of the Small LECs on the Proposed Decision, p. 6.

scenario might occur constitutes insufficient reason to discard the Proposed Decision's non-discrimination benchmarks. Rather, the need for an occasional exception can be handled as just that, through existing means for handling exceptions. Greenlining respectfully urges that using benchmarks with an extension provision is preferable to creating a rule around the exceptions, especially one that would deviate from one of DIVCA's key priorities, that of closing the digital divide in low-income and rural communities.

(2) Franchise Holders Building Out Under Individually-Approved Plans Should Be Held to a Rigorous Standard of Proof When Applying for an Extension

Greenlining agrees with the position of the California Community Technology Policy Group and the Latino Issues Forum ("CCTPG/LIF") that franchise holders following individual build-out plans under GO 169 § VI(B)(1)(3) should be viewed with disfavor if they apply for an extension under § 5890(f).⁸ The Commission should take care to ensure that such franchise holders are not delaying unduly in their build-out process. Greenlining agrees with CCTPG/LIF that the approval process for an application for extension filed by a franchise holder following an individual build-out plan should be a full Commission proceeding with opportunity for public participation.⁹

(3) The Commission Should Review Each Holder's Franchise Area to Ensure that It Is Drawn in a Non-Discriminatory Manner

Greenlining agrees with the position of the California Cable & Telecommunications Association, posed in a footnote, that franchise holders could conceivably self-define their franchise areas to exclude low-income households. In this manner, unscrupulous carriers could attempt to evade the Commission's non-discrimination requirements.¹⁰ Greenlining respectfully

⁸ Opening Comments of CCTPG/LIF on the Proposed Decision, p. 1.

⁹ Id.

¹⁰ Opening Comments of CCTA on the Proposed Decision, p. 2, fn. 1.

urges the Commission to be wary of this possibility. When reviewing compliance with DIVCA's non-discrimination provisions, the Commission must not only ensure that the appropriate percentage of low-income households are being served, but also that franchise areas are drawn according to legitimate factors and not excluding communities that may be more difficult to serve.

(4) The Commission is Justified in Requiring Advance Approval of Individual Build-Out Plans

The Small LECs argue that requiring advance approval of build-out plans for carriers that cannot meet the build-out benchmarks constitutes an unduly onerous burden on small franchise holders, and that the Commission is not empowered to require advance approval.¹¹ SureWest TeleVideo ("SureWest") echoes this point, and argues that prior approval contradicts DIVCA's intent to create a more flexible video franchising process.¹² The Small LECs are essentially arguing that the Commission's role should be as a playground monitor, waiting for signs of non-compliance before undertaking an investigation and corrective action. Greenlining does not believe this is the proper role for the Commission under DIVCA. Rather, the Commission should strive for the most efficient process possible, with the benefit of consumers as its first priority. Greenlining submits that reserving build-out approval for enforcement actions against individual non-compliant franchise holders does the consumer a disservice by allowing franchise holders to delay their compliance until they get caught red-handed. It also shifts the burden of compliance from the carriers, who are benefiting from the streamlined state franchise system, to the Commission. Greenlining believes such a shift would be inefficient and improper.

¹¹ Opening Comments of the Small LECs on the Proposed Decision, p. 8.

¹² Opening Comments of SureWest on the Proposed Decision, p. 3.

Fundamentally, the ultimate goal of DIVCA is to increase video and broadband service statewide. In order to best achieve this goal, DIVCA and the Commission have set benchmark standards toward which all carriers must strive. If a carrier requires special treatment under these statewide standards, it is entirely reasonable for the Commission to ask the carrier to demonstrate that need. Small carriers who wish to take advantage of DIVCA's streamlined franchise system should not be permitted to define exemptions solely on their own terms, without any Commission approval, and should not be permitted to evade compliance with statewide standards *designed to benefit consumers* until the Commission investigates the carrier for non-compliance. Greenlining submits that this simply cannot be the intent behind DIVCA's more flexible franchise process, and recommends that the Commission adopt the proposed system of prior approval of individual carrier build-out plans.

(5) Separate “Safe Harbor” Standards for Smaller Franchise Holders are Unnecessary and Inefficient

The Small LECs again argue that relaxed safe harbor standards should be implemented for smaller franchise holders, referring to the proposal offered by SureWest in earlier comments. The Small LECs argue that the legislature intended to reduce the burdens of build-out on smaller carriers, therefore relaxed standards are appropriate.¹³ However, Greenlining submits that the Proposed Decision strikes the appropriate balance between encouraging build-out to serve consumers and acknowledging the resource constraints faced by small franchise holders. The Proposed Decision recognizes that the necessary flexibility is built into the statute in the form of extended time to satisfy build-out standards and exemptions in the event that build-out is simply cost-prohibitive.¹⁴ Again, Greenlining reiterates its support for the Commission's decision to

¹³ Opening Comments of the Small LECs on the Proposed Decision, p. 9.

¹⁴ Proposed Decision, p. 14.

maintain consistent standards. Greenlining also notes that the Small LECs contend that the Commission has no authority to add provisions to existing legislation, in the context of the Commission's extension of non-discrimination provisions to small carriers.¹⁵ Yet here they argue that the Commission should do just that, by adding a provision that relaxes build-out standards for small franchise holders *in addition* to the existing provisions which allow them to apply for an extension or an outright exemption if circumstances warrant. Greenlining respectfully urges that the Small LECs cannot have it both ways. We submit that the proposed second tier of build-out benchmarks is unnecessary because it provides no additional benefit to small franchise holders and only delays the expansion of video service access to consumers.

III. THE COMMISSION SHOULD EXPAND ITS REPORTING REQUIREMENTS TO ENSURE THAT DIVCA'S GOAL OF CLOSING THE DIGITAL DIVIDE IS FURTHERED

Greenlining submits that the Commission should empower itself with the tools it needs to ensure that DIVCA is actually working, and that the digital divide in California is in fact closing. SureWest identifies in its Opening Comments on the Proposed Decision that DIVCA is far-reaching as compared to other state franchising proposals.¹⁶ Surely the Legislature did not intend to create such a proactive consumer protection initiative without allowing the Commission any mechanisms to ensure that the Act is actually achieving its intended effect.

(1) Reporting on Subscribership and Cost of Service Will Illustrate Whether Available Service is Truly Accessible to Low-Income Households

Greenlining reiterates the arguments regarding additional reporting requirements on subscribership put forth in our Opening Comments, and notes that CCTPG/LIF takes a similar

¹⁵ Opening Comments of the Small LECs on the Proposed Decision, p. 3.

¹⁶ Opening Comments of SureWest on the Proposed Decision, p. 8.

position.¹⁷ The digital divide in California will not actually close unless video and broadband services are utilized, not just available, in all communities.

Verizon notes that GO 169 already requires reporting on video subscribership on a franchise-wide basis, and contends that this aggregate information is sufficient. Verizon further notes that the non-discrimination provisions in § 5890(b) are all based on access, not subscribership. Therefore, Verizon concludes, the Commission does not need subscribership data by census tract to enforce this provision.

Greenlining respectfully disagrees with Verizon on this point, and urges that if the Commission is to actually close the digital divide between low-income and higher-income communities, it must first know the difference in video service penetration between communities at varying income levels. This information is the *essential* first step in examining ways to make information technology, upon which modern life increasingly depends, affordable to low-income households. DIVCA, since it applies to all franchise holders operating in California, is the most efficient and complete means of obtaining this valuable information. A voluntary survey, as suggested by Verizon,¹⁸ will not generate complete information on subscribership statewide.

In order for the Commission to take steps to ensure that these services are truly accessible to all communities, in an economic as well as a technical sense, it must know whether households in certain areas or at certain income levels are taking advantage of the available services. For this reason, Greenlining recommends that the Commission require reporting on subscribership by census tract. Greenlining also recommends that the Commission require reporting on the cost of video and broadband services by census tract, without exercising any control over pricing. Affordability is key to accessibility. If households in certain areas are not

¹⁷ Opening Comments of CCTPG/LIF on the Proposed Decision, p. 3.

¹⁸ Opening Comments of Verizon on the Proposed Decision, p. 2.

taking advantage of available services, the Commission should be allowed to glean some insight as to the reason for the under-utilization, so that it can take steps to address it.

(2) Reporting on Technology Offered by Census Tract Will Ensure that Franchise Holders Do Not Provide Inferior Service to Low-Income Communities

Greenlining supports the position taken by TURN with respect to required reporting on technology by census tract. TURN notes that the Proposed Decision requires subscribership data for wireless broadband, and argues that the Commission should require the same data for other broadband technologies as well. Additionally, as TURN indicates, all wireless is not equal. Greenlining agrees that the Commission should require data on upload and download speeds, in order to ensure that franchise holders are in compliance with § 5890(j)(4), which requires franchise holders to provide similar service across the various technologies they utilize.¹⁹ DIVCA intends to close the digital divide by making comparable video and broadband service available to all California consumers regardless of income level. The Commission will advance only partially toward this goal if it does not take steps to ensure that the quality of service offered to low-income communities is *of equal quality* to that provided to more affluent communities. Allowing franchise holders to provide sub-par service to low-income communities will maintain a second class of consumers who have access only to inferior service, while giving the appearance that the digital divide is closing. Therefore, Greenlining urges that reporting on technology deployed by census tract is essential to enforcing the non-discrimination provisions under § 5890(b) and the similar service provisions under § 5890(j)(4).

¹⁹ Opening Comments of TURN on the Proposed Decision, p. 2-4.

IV. CONCLUSION

Greenlining respectfully urges the Commission to consider and adopt the above recommendations, to ensure that DIVCA's goal of closing the digital divide can be achieved.

Dated: September 18, 2007

Respectfully submitted,

/s/ Robert Gnaizda

Robert Gnaizda

The Greenlining Institute

/s/ Thalia N.C. Gonzalez

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CERTIFICATE OF SERVICE

I, Thalia N.C. Gonzalez, am 18 years of age or older and a non-party to the within proceeding. I am a resident and citizen of the State of California with the business address at the Greenlining Institute of 1918 University Avenue, Second Floor, Berkeley, CA 94704 and telephone number of 510-926-4002.

On September 18, 2007, I caused the following document:

**REPLY COMMENTS OF THE GREENLINING INSTITUTE ON THE OPINION RESOLVING
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to be served upon all interested parties of record in R.06-10-005 named in the official service list via e-mail to those whose e-mail address is listed in the official service list and via first class mail with postage prepaid or facsimile to those whose e-mail address is not available.

I certify that the foregoing is true and correct.

Executed in Berkeley, California on September 18, 2007.

/s/ Thalia N.C. Gonzalez
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SERVICE LIST FOR R.06-10-005

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